No. 16282.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

REXALL DRUG COMPANY, a corporation, and ARNOLD L. LEWIS, doing business as Studio Cosmetics Company,

Appellants,

vs.

SANDRA MAE NIHILL, etc.,

Appellee.

Reply Brief of Appellant Arnold L. Lewis, Doing Business as Studio Cosmetics Company.

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A careful analysis of appellee's brief discloses a treatment so light as to suggest an inability to satisfactorily answer the substantial points raised in appellant's opening brief.

I.

The Evidence Was Utterly Insufficient to Establish Actionable Negligence Against the Manufacturer.

Appellant again refers to the full and detailed statement of facts set forth in the opening brief. While appellee proclaims that the statement of the case in appellant's opening brief is inaccurate "in many places," no effort has been made to point out any claimed inaccuracy. On the other hand, some of the "facts" as set forth by appellee cannot remain unchallenged. It is asserted that the chemical ammonium thioglycolate is "toxic" through "the skin

as well as orally" (Appellee's Br. p. 2). In support are transcript references to pages 336, 337 and 357. The most that can be said for these references is that Dr. Melton testified that "thio" *in certain concentrates* (not identified by the doctor voluntarily or at appellee's suggestion), "can be harmful in the sense that other allergic reactions can occur in concentrations that are used. Alopecia *may* occur and toxic reactions have been *reported*" [R. p. 337; emphasis added].

This doctor did *not* testify that "thio" was toxic when *applied to the scalp.* Appellant does not claim that "thio" is designed for human consumption. Appellant does assert that the evidence demonstrates that "thio," since 1941 (a period of fourteen years, at the time of this lawsuit) has been an effective method for waving the hair of millions of American women.

Under Point I of appellee's brief are listed certain pieces of evidence which are claimed to furnish a foundation for the judgment.

(1) It is suggested that the bobby pins were rusted and corroded the day following the permanent. (Obviously after the use of water, the permanent wave solution, and the neutralizer.) There is absolutely no probative value to this so-called piece of evidence. There is no evidence as to *why* the bobby pins were rusted or corroded. It is only by resort to the rankest type of speculation that one could draw a relationship between the rusting of a metal bobby pin and alleged damage to human hair.[1] Rust and corrosion are processes that constantly take place in

[1]Every swimming pool owner has had the job at one time or another of removing rusted and corroded bobby pins from the bottom of the pool, yet the swimmers suffered no damage to their hair.

metals, *without* the intervention of any type of chemicals. The ordinary iron skillet is found rusted on the bottom in the morning if ordinary water has been permitted to remain on the surface of the metal.

(2) Appellee urges that the *solution* smelled "very strongly, smarted the eyes and stung the skin" (Appellee's Br. p. 5), although no transcript references are cited. This evidence likewise has *no probative value.* Again it is a matter of common knowledge that anything with ammonia in it smells "strong." In using ordinary household ammonia, everyone has smelled the strong odor. There is not one scintilla of evidence, expert or otherwise, that the "strong smell" would in any manner affect the product in question. Any ammonia preparation may "sting" the skin. The *instructions themselves* suggest the use of "rubber gloves" if the hands are sore or chapped or sensitive (Appx. B, Op. Br. of Appellant Lewis).

It is interesting to note that plaintiff's witness Mrs. Carlson stated as follows:

> "Q. Could you describe to me whether or not when you opened the bottle of Cara Nome that it had any unusual odor? A. None other than *the smell that most permanents have"* [R. p. 529, italics added].

As to the supposed burning or stinging, Mrs. Carlson testified:

> "Q. Would you tell me whether or not the use of it on your hands or on your scalp produced any unusual sensation? A. Well, slight burning. I mean that's not really a burn. It's just that your hands may be tired from putting up pins, but they feel hot. . . .

> Q. Was this particular burning sensation such as you have described any different than that used by or felt by you in other home wave solutions? A. *I don't believe so . . .*" [R. pp. 529-530].

Mrs. Carl Carlson, with reference to the *odor,* testified that, "Well, they *all* got a pretty hot smell" [R. p. 534]. *Plaintiff herself made no claim that she had* ANY *burning sensation during the administration of the wave.*

> "Q. You didn't have any burning sensation or feeling while it was being given to you? A. No" [R. p. 237].

(3) Appellee attempts to infer that there was an increase of 40 per cent in the "thio" content over the *"intended"* or "presumed" percentage (Appellee's Br. p. 5).

This argument is specious and without any legitimate foundation. Lewis manufactured several types of home permanent kits. One was a kit for small girls (2-12 years) which contained approximately 5 per cent "thio." The kit in question contained approximately 7 per cent "thio" and was *intended* to contain that percentage. *No question of increase in percentage is involved at all.* Appellee attempts to erect a "straw man." Plaintiff purchased an adult kit and claims to have used *that* kit. Plaintiffs had in the courtroom and in evidence a bottle of the solution from the same batch and *never had it opened and analyzed.* It was within appellee's admitted power in this case to have proven the *precise chemical content of the preparation.*[2]

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[2]See reply brief, page 4, where appellee states that direct proof of negligence on the part of the manufacturer is difficult. Yet here, contrary to most cases, plaintiff actually had a sample from the identical batch #181 in her possession and did nothing about it.

Appellee has neither produced nor pointed to *any* evidence indicating that ammonium thioglycolate in the percentage used in this case or in any other percentage *is in any manner harmful to the hair of human beings.* More important, the evidence shows without conflict that appellant manufactured the preparation in conformity with the standards in the industry.

(4) This suggested that Dr. Melton testified that "thio" was toxic. As has already been pointed out he gave *no* such testimony.

(5) The testimony of the Carlsons is worthless in attempting to establish negligence on the part of the manufacturer. The statement that these two persons "had also a *disastrous loss of hair*" (Appellee's Br. p. 4) is utterly inaccurate. These women had the *ends* of the hair split, it changed color and was strawy and dry [R. p. 528]. Both got hair cuts and *had no further problem.*

Counsel has completely ignored the fact that liability against the manufacturer is predicated on fault. What evidence establishes negligence on the part of the defendant manufacturer? There is no evidence that the formula was improper or not one customarily used by reputable manufacturers of cosmetics. The burden of proof was upon plaintiff to establish negligence. There is no evidence that the particular batch or any batch was improperly compounded, although plaintiff had in her attorney's possession and later in evidence [Pltf. Ex. 34, R. p. 467] a bottle of the solution from the *same batch.* Plaintiff's power and ability to produce evidence on this score was unhindered—if she claimed the "thio" content was improper surely she would have had a chemist analyze the sample. For reasons of his own counsel did not see fit to gamble on a chemical analysis which would have revealed a normal "thio" content.

II.

The Doctrine of Res Ipsa Loquitur Was Clearly Not Applicable.

The North Dakota Court has actually only two cases dealing with the doctrine of *res ipsa loquitur*. The case of *Burt v. Lake Region Hair Service,* 54 N. W. 2d 339 (N. D., 1952), does not deal with the court's interpretation of the doctrine *res ipsa loquitur*. *No criteria* are set forth by the court for its application and the case actually stands for the proposition that under the peculiar facts of the case, there was sufficient *circumstantial* evidence of negligence to support the verdict.

In the only two later cases where the court expressly refers to the doctrine, *no mention whatever* is made of the *Burt* case.

The case of *Kuntz v. McQuade,* 95 N. W. 2d 430, relied on by appellee is *not helpful* for the reason that the parties *stipulated* to try the "exploding bottle" case on the theory of *res ipsa loquitur*. The defendant prevailed and on appeal the court merely held that since the case was tried on the theory that *res ipsa loquitur* applied, plaintiff was in no position to complain on appeal and that the jury was not bound to find in accordance with any inference that might emanate from the *stipulated* application of the doctrine.

The only case directly in point is *Farmers Home Mut. Ins. Co. v. Grand Forks Imp. Co.,* 55 N. W. 2d 315. Appellees attempt to thwart the application of the *Farmers* case *cannot prevail*. The language from this Opinion set forth on pages 33 and 34 of the opening brief of Lewis clearly supports the conclusion that North Dakota is in step with California and the vast majority of states *is*

rejecting the application of the doctrine where there is *no balance* of probabilities in favor of negligence on the part of the defendant.

How can there be any balanced probabilities where there is a serious conflict as to the manner of the application of the solution and the neutralizer; where the evidence reveals without conflict the persistent use of a prescription drug to the hair for a period of months, under circumstances not *shown to have been in accord with the orders* prescribed by the doctor; where there was evidence that the plaintiff's condition may well have been due to a thyroid condition, for which her own doctor prescribed thyroid; where plaintiff's own medical evidence failed to indicate the strength of the solution of "thio" that might presumably be necessary to damage hair; where as opposed to plaintiff's alleged injury there were (in addition to the other manufacturers of like products) some 400,000 Cara Nome kits sold each year with only an average of eight claims; where plaintiff's own Dr. Martin conceded that selsum, the drug he prescribed at a time when plaintiff had not lost her hair "could cause falling hair" [R. p. 320]; where there was never any history of a chemical burn, mild or otherwise; where there was evidence that plaintiff was suffering from seporrhic dermatitis, a condition having its onset at puberty; where there was ample evidence that plaintiff was suffering from alopecia arcataie, a loss of hair *from unknown causes.* These and many other facts clearly spelled out in the evidence, effectively demonstrate that no balance of probabilities exists pointing to any negligence and prevent the application of the doctrine. The plaintiff has failed to make out a *prima facie* case of liability.

Farmers Home Mut. Ins. Co. v. Grand Forks Imp. Co., 55 N. W. 2d 315 at 317-318.

The appellee relies for the form of the criticized instruction on *res ipsa loquitur* on *Bish v. Employers Liability Ins. Co.,* 236 F. 2d 62. Actually little similarity appears between the trial court's instruction on *res ipsa loquitur* and the instruction in the *Bish* case (*supra*). In that case the court instructed the jury in part as follows:

> "The product put out by the Toni Company known as the Toni permanent wave—Toni Cold Permanent Wave; if put out according to its formula, is not negligence. In other words, the product that is put out by the Toni Company, if put out in accordance with its formula, is not per se negligence in itself, because the evidence is overwhelming to the effect that there are millions of bottles of it put out and used from which no injury occurs, and in the preparation of which there is no negligence, so that in this particular case, for the plaintiff to win, the plaintiff must show that there was negligence in the manufacturing of the particular Toni product that was purchased and used by this plaintiff—the plaintiff must show that before the plaintiff can recover, and it must be based on such negligence." (236 F. 2d 62 at 68.)

When appellee states that she took the criticized instruction "almost in its entirety" from the *Bish* case (Appellee's Br. p. 13) she is obviously inaccurate and it clearly appears that the quoted instruction (as well as others) from the *Bish* case were omitted by appellee.

It is submitted that appellee has failed to support the giving of the *res ipsa loquitur* instruction.

III.

It Was Error to Instruct on the Theory of an Inherently Dangerous Product.

Counsel states that no authority is presented in support. Please see the case of *Bish v. Employers Liability Ins. Co.*, 236 F. 2d 62, *relied upon by appellee.*

In the *Bish* case, a thioglycolate case, the

> "plaintiff urges the application of the rule that 'The manufacturer may be liable for failure to instruct as to the safe method of use of a pharmaceutical preparation which is inherently dangerous.' . . . We can subscribe to this statement, *but it has no* application here. The assumption that the Toni preparation is *inherently dangerous is not justified by the record.*" (236 F. 2d at 69.) (Emphasis added.)

The Court of Appeals points out in the *Bish* case that it is not negligence to fail to warn of a danger where there is only a "remote possibility of danger" (p. 69).

Clearly the court's instruction, promptly objected to, relating to a product "inherently dangerous" was extremely prejudicial to appellant. Inherent in the wording of the criticized instruction is the concept that the product in question was in fact "inherently dangerous." *The record fails to substantiate any such theory.* Thioglycolate was just as "toxic" in the *Bish* case as in the case at bar. Appellee's argument is indeed a desperate one. Many common household items are "toxic" if consumed internally and yet are perfectly safe when used on the hands, feet, hair or body. Here too, the record is utterly devoid of evidence from any of plaintiff's doctors indicating that "thio" is anything other than a well-recognized hair preparation, and not harmful in the concentrations involved herein.

Conclusion.

It is respectfully submitted that appellee has not answered appellant's contentions; that the record is devoid of any proof of negligence on the part of the manufacturer; that there is no basis for the application of the doctrine *res ipsa loquitur*. That a jury of lay persons, misled by passion and prejudice, has imposed liability upon this defendant without any showing of fault and under circumstances where in no event, under a fair appraisal of the evidence, can here be said to be any balance of probabilities pointing to any negligence on the part of this appellant. The judgment should be reversed.

Respectfully submitted,

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and

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